

***United States Court of Appeals
for the Second Circuit***



APPENDIX

76-1049

To be argued by
SHEILA GINSBERG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

ARTHUR BRECHT,

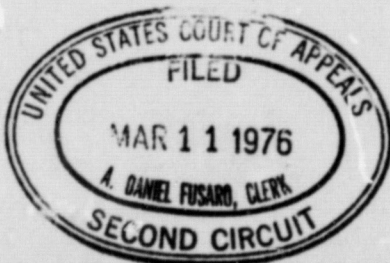
Defendant-Appellant.

*b
p/s*

Docket No. 76-1049

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



SHEILA GINSBERG,
Of Counsel.

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
ARTHUR BRECHT
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

74-589

0108
0109

DATE	PROCEEDINGS
8-8-75	Before Bramwell, J - Indictment filed.
8-26-75	Before WEINSTEIN J - case called & adj'd to 9-4-75 at 9:30 am (for pleading)
9/4/75	Before WEINSTEIN, J.- Case called- Deft present without counsel-case adj'd to 10/1/75 at 9:30 A.M. for pleading- deft to obtain counsel
9/3/75	Notice of readiness for trial filed
10/1/75	Before WEINSTEIN, J.-Case called- Deft not present-bench warrant ordered & stayed for 48 hours at 9:30 A.M.- deft and counsel present at 10:15 A.M. bench warrant vacated-deft arraigned and enters a plea of not guilty-pre-trial conference held and concluded-deft O.R.- trial set for 11/10/75 at 10:00 A.M.
10/2/75	Notice of Appearance filed

75CR 614

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DATED	11/29/76
BY	CLERK
DEPUTY CLERK	

DATE	PROCEEDINGS	PLAINTIFF	DEFENDANT
11/5/75	Before WEINSTEIN, J.- Case called- Deft and counsel present- David Ferrara is relieved as counsel- Michael Asen of Legal Aid assigned counsel-deft's motion for adjournment of trial is granted-case set down for motions on 11/7/75 at 2:30 P.M.- trial set for 11/13/75 at 10:00 A.M. marking of documents set for 11/12/75 at 10:00 A.M.		
11-7-75	Before WEINSTEIN J - case called - deft not present- counsel M. Asen present - defts motion to dismiss count one is denied - defts motion to redact is denied.		
11-12-75	Before WEINSTEIN J - case called - Deft & atty Michael Asen of Legal Aid present - trial ordered and Begun - trial contd to Nov. 13, 1975 at 10:00 am.		
11-13-75	Before WEINSTEIN J - case called - deft Brecht & counsel Cheryl Schwartz present - trial resumed & Jurors selected and sworn - trial contd to Nov. 14, 1975 at 10:00 am.		
11-14-75	Before WEINSTEIN J - case called - deft & counsel present - trial Govt rests - Trial contd to Nov. 17, 1975.		
11-17-75	Before WEINSTEIN J -case called - Deft & atty M. Asen present - trial resumed - deft rests - Govt rests - defts motion for judgment of acquittal is denied - defts motion for mistrial is denied - Jury retires for deliberation - Jury returns and renders a verdict of guilty as to count 1 - and disagrees as to counts 2 and 3 - jury polled as to count 1 - Jury sent back for further deliberation as to counts 2 and 3 - jury returns and finds the deft guilty as to counts 2 and 3 - jury polled and discharged -defts motion to set aside the verdict is denied - trial concluded - sentence adjd without date.		
1-23-76	Before WEINSTEIN, J. - Case called. Deft & counsel Michael Asen present. Deft sentenced to imprisonment for a period of 2 years on each of counts 1, 4 and 6 to run concurrently. Execution of sentence is suspended & deft placed on probation for 3 years on each count to run concurrently. On motion of Asst US Atty DePetris counts 2, 3 & 5 are dismissed. Deft advised of his right to appeal. Appeal to be filed.		
1-23-76	Judgment and order of probation filed. Certified copies to Probation.		
1-23-76	Notice of appeal filed. Duplicate of appeal & duplicate of docket entries mailed to C of A. jn		
2/9/76	Order received from court of appeals and filed that record be docketed on		

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

75 CR 614

----- X

UNITED STATES OF AMERICA

INDICTMENT

- against-

ARTHUR BRECHT,

Defendant.

----- X

THE GRAND JURY CHARGES:

Cr. No. _____
(T. 18, U.S.C., §1951 and
§1952)

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.



AUG 8 1975



TIME A.M.
P.M.

INTRODUCTION

1. At all times material hereto, Westinghouse Electric Corporation, Lester, Pennsylvania, held a prime contract with the El Paso Electric Company, El Paso, Texas, for the construction of a power generating plant at Newman Station, Texas. Pursuant to this prime contract Westinghouse Electric Corporation had the responsibility to deliver various technical manuals and publications in interstate commerce to the El Paso Electric Company.
2. At all times material hereto, the defendant ARTHUR BRECHT was employed by Westinghouse Electric Corporation as manager of the technical publications department.

3. At all times material hereto, National Technical Publications, Inc., Dix Hills, New York, was a company substantially engaged in interstate commerce. It was in the business of producing technical manuals and publications for prime contractors in various states, and had submitted a bid on a subcontract for the production of the technical manuals and publications referred to in Paragraph 1 herein.

4. At all times material hereto, Joseph Racker was the President of National Technical Publications.

COUNT ONE

1. On or about the 28th day of December, 1974, within the Eastern District of New York, the defendant ARTHUR BRECHT knowingly and wilfully did attempt to obstruct, delay and affect

commerce as that term is defined in Title 18, United States Code, Section 1951, in that the said defendant attempted to obtain the sum of One Thousand Dollars (\$1,000) from Joseph Racker with his consent induced by the wrongful use of fear that otherwise National Technical Publications would not be awarded the subcontract for the production of technical manuals and publications which pursuant to the prime contract Westinghouse Electric Corporation had the responsibility to deliver to the El Paso Electric Company.

2. The aforesaid conduct of the defendant ARTHUR BRECHT, by potentially depleting the assets of National Technical Publications, Inc., which transacted business in interstate commerce, purchased and sold goods and services in interstate commerce, and made use of the facilities of interstate commerce, had the potential of affecting commerce as that term is defined by Title 18, United States Code, Section 1951.

3. The aforesaid conduct of the defendant ARTHUR BRECHT, by potentially interfering with the shipment in interstate commerce to Westinghouse Electric Corporation of the technical manuals and publications and the subsequent shipment of those technical manuals and publications to the El Paso Electric Company, pursuant to the prime contract, had the potential of affecting commerce as that term is defined by Title 18, United States Code, Section 1951.

COUNT TWO

On or about the 12th day of December, 1974, within the Eastern District of New York and elsewhere, the defendant ARTHUR BRECHT used a facility in interstate commerce, to wit, interstate telephone wires, with intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, to wit, larceny - extortion and commercial bribe receiving from Joseph Racker, in violation of Sections 155.05-2(e)(ix) and 180.05 of the Penal Law of the

State of New York, and thereafter did perform and attempt to perform acts to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of said unlawful activity. (Title 18, United States Code, Section 1952).

COUNT THREE

On or about the 20th day of December, 1974, within the Eastern District of New York and elsewhere, the defendant ARTHUR BRECHT did travel in interstate commerce between Pennsylvania and New York, with intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, to wit, larceny by extortion and commercial bribe receiving from Joseph Racker, in violation of Sections 155.05-2(e)(ix) and 180.05 of the Penal Law of the State of New York, and thereafter did perform and attempt to perform acts to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of said unlawful activity. (Title 18, United States Code, Section 1952).

COUNT FOUR

On or about the 23rd day of December, 1974, within the Eastern District of New York and elsewhere, the defendant ARTHUR BRECHT did travel in interstate commerce between Pennsylvania and New York, with intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, to wit, larceny by extortion and commercial bribe receiving from Joseph Racker, in violation of Sections 155.05-2(e)(ix) and 130.05 of the Penal Law of the State of New York, and thereafter did perform and attempt to perform acts to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of said unlawful activity. (Title 18, United States Code, Section 1952).

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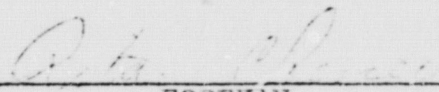
COUNT FIVE

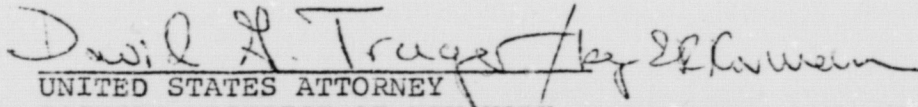
On or about the 26th day of December, 1974, within the Eastern District of New York and elsewhere, the defendant ARTHUR BRECHT used a facility in interstate commerce, to wit, interstate telephone wires, with intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, to wit, larceny by extortion and commercial bribe receiving from Joseph Racker, in violation of Sections 155.05-2(e)(ix) and 180.05 of the Penal Law of the State of New York, and thereafter did perform and attempt to perform acts to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of said unlawful activity. (Title 18, United States Code, Section 1952).

COUNT SIX

On or about the 27th day of December, 1974, within the Eastern District of New York and elsewhere, the defendant ARTHUR BRECHT did travel in interstate commerce between Pennsylvania and New York, with intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, to wit, larceny by extortion and commercial bribe receiving from Joseph Racker, in violation of Sections 155.05-2(e)(ix) and 180.05 of the Penal Law of the State of New York, and thereafter did perform and attempt to perform acts to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of said unlawful activity. (Title 18, United States Code, Section 1952).

A TRUE BILL.


FOREMAN


UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

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9 THE COURT: I'm now going to tell you what
10 the law is, ladies and gentlemen, and I want you
11 to follow my instructions. You will decide the
12 facts. I have no views as to the guilt or inno-
13 cence of this defendant. Anything that I may have
14 said that leads you to believe that I have a view,
15 should be stricken from your minds. My only desire
16 and intent is to see this defendant is fairly tried
17 in accordance with the law and the facts. If I
18 struck any material you are not to consider it when
19 you are deliberating. The decisions and rulings
20 that I made were based upon procedural matters.
21 They did not reflect on guilt or innocence. As I
22 have told you the fact that this is a prosecution
23 brought in the name of the United States, it is not
24 entitled to any weight in your deliberations. The
25 defendant and the Government are entitled to equal

and fair treatment in this Court.

Nobody is entitled to sympathy or favor.

The indictment is merely a way of bringing a charge into Court. It is not evidence at all. I'm going to read from portions of the indictment, but you will understand that this is just a charge and not evidence at all.

This defendant has pleaded not guilty. A defendant is presumed to be innocent and the presumption of innocence remains with him right through your deliberations.

The Government has the burden of proving him guilty beyond a reasonable doubt with respect to each element of each of the counts as I will describe them to you.

The defendant doesn't have to submit any evidence at all. He's presumed to be innocent. The burden of proof beyond a reasonable doubt lies on the Government throughout the trial. A reasonable doubt means a doubt sufficient to cause a prudent person to hesitate to act in the most important affairs of his life and finding the person to be guilty or innocent of a serious charge, such as the one we have here, is serious and you will bear

1
2 that in mind. If you should find beyond a reason-
3 able doubt that he is guilty you should come in
4 with a guilty verdict and if you should have a rea-
5 sonable doubt you should acquit.

6 A defendant does not have to take the witness
7 stand and you may draw no reasonable inferences
8 and no inferences at all unfavorable to him because
9 he does not testify.

10 You may not consider the fact that this de-
11 fendant did not testify. You're going to have to
12 rely upon your own common sense in evaluating this
13 evidence.

14 The fact here is that the defendant is charged
15 with three crimes or counts arriving from the alleged
16 extortion of money from Joseph Racker in his posi-
17 tion as President of National Technical Publications,
18 Incorporated. Each one of these counts must be
19 considered separately by you. That is you can come
20 in with a verdict of innocent or guilty with respect
21 to any of these counts.

22 You can come in individually, that is one at
23 a time or you can wait until you complete all your
24 deliberations and come in with all three verdicts.

25 Count 1 reads as follows, "Westinghouse

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2 Electrical Corporation, Lester, Pennsylvania, held
3 a prime contract with El Paso Electric Company,
4 of El Paso, Texas for the construction of a power
5 generating plant at Newman Station, Texas. Pursuant
6 to this prime contract Westinghouse Electric Cor-
7 poration had the responsibility to deliver various
8 technical manuals and publications to interstate
9 commerce to the El Paso Electric Company.

10 The defendant Arthur Brecht was employed by
11 Westinghouse Electric Corporation as manager of
12 the technical publications department.

13 National Technical Publications of Dix Hills,
14 New York was a company substantially engaged in
15 interstate commerce. It was in the business of
16 producing technical manuals and publications for
17 prime contracts and various states and had submitted
18 a bid on a sub-contract for the production of the
19 technical manuals and publications for the El Paso
20 Electric Company.

21 Joseph Racker was the President of National
22 Technical Publications.

23 On or about the 28th day of December, 1974,
24 within this district, the defendant Arthur Brecht,
25 knowingly and wilfully did attempt to obstruct,

1
2 delay and affect commerce as that term is defined,
3 in that the defendant attempted to obtain the sum
4 of \$1,000 from Joseph Racker with his consent,
5 induced by the wrongful use of fear that otherwise
6 National Technical Publications would not be awarded
7 the sub-contract for the production of technical
8 manuals and publications which pursuant to the
9 prime contract Westinghouse Corporation had the
10 responsibility to deliver to the El Paso Electric
11 Company.

12 This conduct by Arthur Brecht, by potentially
13 depleting the assets of National Technical Publica-
14 tions, Incorporated, which transacted business in
15 interstate commerce, purchased and sold goods in
16 interstate commerce and made use of the facilities
17 of interstate commerce, had the potential of affect-
18 ing commerce as that term is defined.

19 This conduct of the defendant Arthur Brecht
20 potentially interfering with the shipment in inter-
21 state commerce to Westinghouse Electric Corporation
22 of the technical manuals and publications and the
23 subsequent shipment of those publications to the
24 El Paso Electric Company, pursuant to the prime
25 contract, had the potential of affecting commerce

as that term is defined.

Now essentially that is the extortion count. He's charged that he extorted money or attempted to extort money from Joseph Racker in 1974.

You are charged that this is a violation of Section 1951 of Title 18 of the United States Code which reads as follows:

"Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by extortion or attempts or conspires to do so shall be guilty of an offense against the United States."

As used in this Section the term extortion means the obtaining of property from another with his consent induced by wrongful use of fear.

The term commerce means all commerce between any point in a state and any point outside of the state.

There are three elements that have to be proven by the Government under this statute and charge.

First, that the defendant attempted to induce his victim to part with property. Here, \$1,000.

Second, he did so by attempting to extort

1
2 defendant must have tried to induce his victim to
3 part with property by means of extortion. This
4 has a precise legal meaning and I'm going to read
5 the definition again.

6 The term extortion means, "The obtaining of
7 property from another, with his consent, induced
8 by wrongful use of fear."

9 The term fear here has a commonly accepted
10 meaning. It is a state of anxious concern, alarm,
11 apprehension of anticipated harm to the business
12 or a threatened loss to the business.

13 It is not necessary to show that the threat
14 or wrongful use of fear was successful in persuading
15 the victim to part with his money or property.

16 The question here is whether the defendant
17 attempted to make wrongful use of such fear to
18 induce the payment of money. That is in fear of
19 economic loss, that is fear.

20 It is not necessary for a conviction that
21 the Government show that the defendant actually had
22 the power to withhold a contract from National
23 Technical Publications, Incorporated. The issue
24 isn't whether he had the power, but whether it was
25 reasonable for the alleged victim under these cir-

1
2 circumstances to believe that he had the power.

3 The mere voluntary payment of money or de-
4 livery of property unaccompanied by any fear of
5 economic loss would not constitute extortion. Un-
6 less the payment here were made under some form of
7 compulsion, there is no violation of the law.

8 In effect the victim may have gone to the
9 Federal authorities, but the matter before you is
10 not whether the money was paid. It is not a de-
11 fense to the charge. That is in fact he paid it
12 while the F.B.I. was there has nothing to do with
13 it. He would get it back.

14 That in itself is not an offense.

15 If you believe that Racker voluntarily paid
16 the money without any fear or without any coercion
17 in exchange for the stock transfer to him without
18 any fear of economic loss or compulsion, and it
19 was a bonafide transaction, then you must acquit
20 the defendant on the first count.

21 On the other hand, it doesn't make any dif-
22 ference what the value of the stock was, even if
23 it was a good deal to pay \$1,000 for it, if the
24 defendant would not have gotten Racker to give him
25 \$1,000 except out of fear.

1
2 In other words, you can't induce a person to
3 enter into a good deal by fear. That still is ex-
4 tortion, if he pays for it.

5 You have to ask yourselves what is the nature
6 of this. Was it a deal for the sale of stock entered
7 into voluntarily by Racker or was it a coerced thing
8 under fear of economic harm.

9 The third and final element which you must
10 determine beyond a reasonable doubt is that the de-
11 fendant in an attempt to extort would have, if
12 successful, delayed or interrupted or adversely
13 affected interstate commerce in any way or degree.
14 Even to a minimal degree.

15 No conscious purpose of obstructing inter-
16 state commerce by the defendant need be shown. It
17 is only necessary that it is likely or was likely
18 that a plan of extortionate behavior, if you find
19 it existed, such as described here, would have been
20 in the nature of affecting or obstructing commerce.
21 There doesn't have to be major distribution or
22 obstruction. Interstate commerce doesn't have to
23 be reduced. It's enough if it were shifted from
24 one producer of technical manuals to another.

25 You recall there was testimony that National

1
2 Technical Publications was a New York corporation
3 and was situated in Dix Hills, New York and that
4 the El Paso Electric Company, to whom the technical
5 manuals had been sent under its contract with
6 Westinghouse, they were situated in Pennsylvania.

7 Interstate commerce may also be adversely
8 affected by an increase in the cost of doing busi-
9 ness in interstate commerce or by the reduction of
10 the profits from interstate commerce.

11 Now that is the extortion count. Let's
12 turn to the next count.

13 Count 2, "On or about the 23rd day of Decem-
14 ber, 1974, within the Eastern District of New York,
15 the defendant Arthur Brecht did travel in inter-
16 state commerce between Pennsylvania and New York,
17 with intent to promote, manage, establish, carry on
18 and facilitate the promotion, management or esta-
19 blishment and carrying on of an unlawful activity,
20 to wit, larceny by extortion and commercial bribe
21 receiving from Joseph Racker in violation of the
22 statutes of the State of New York. Thereafter he
23 performed and attempted to perform acts to promote
24 such unlawful activity.

25 Count 3 is the same except that it is on

the 27th day of December. Count 2 is the 23rd.

You remember that was the first meeting on the tapes and on the 27th, that is the second as I recall.

Incidentally, if your memory is different than from mine, your memory will control. I'm just giving you from time to time my own recollection of what we heard here.

Now, these two counts, counts 2 and 3 were alleged violations of Section 1952 of Title 18 of the United States Code which is known as the Travel Act.

The first one is the extortion count and count 2 and 3 are Travel Acts, that is traveling in interstate commerce in order to facilitate or help in the commission of a crime in one of the states. Here it is New York.

The statute provides and I'm quoting, "Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail with intent to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity and thereafter performs

1 or attempts to perform any of the acts specified
2 above shall be guilty of an offense against the
3 United States." The statute defines unlawful ac-
4 tivity as including extortion or bribery in viola-
5 tion of the laws of the state in which it is commit-
6 ted or of the United States.
7

8 So there you have to have three elements
9 proved beyond a reasonable doubt. First that the
10 defendant at or about the charged traveled in
11 interstate commerce, that is across the state boundary
12 Pennsylvania to New York would be interstate com-
13 merce.
14

15 Secondly, that the travel was done with the
16 specific intent to further or to help the unlawful
17 activity of extortion or commercial bribery.
18

19 Third, the defendant following such travel
20 performed or attempted to perform an act which
21 violated the state law involved.
22

23 Interstate commerce again means commerce be-
24 tween one state or another or travel between one
25 state or another.

It is not necessary, although it is essential,
that this be an element of the offense, that at
the time of the travel, the course of unlawful con-

duct be contemplated. It is sufficient from the defendant's travels in interstate commerce in order to facilitate or attempt to facilitate the unlawful activity. You must find beyond a reasonable doubt that the travel or use was with the specific intent of furthering the unlawful activity.

In this case you have to find that he came from Pennsylvania to New York in order to assist himself in extorting money or obtaining a bribe as that is defined.

The Government may establish one of the essential elements by showing that the defendant traveled in interstate commerce for the purposes of facilitating the extortion or commercial bribe receiving.

A person may have several different purposes or motives for a journey and all may prompt in varying degrees the act of making their journey.

It is sufficient that this was the dominant purpose. That is he came to New York for another reason in addition, that wouldn't be a defense. But, it has to be a main reason for coming to New York.

There was testimony with respect to his

travel referred to on those tapes.

Actual or attempted performance of an illegal act is an essential element of the offense under the Travel Act.

Now I am going to tell you what extortion and commercial bribe receiving means under the New York State statute, because under these two counts he's accused of coming here to do an act which would violate the New York statutes.

Section 155.05 says, "A person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof.

Larceny includes a wrongful taking, obtaining or withholding of another's property, with the intent prescribed in Sub-division 1 of this Section, committed in any of the following ways.

By extortion, a person obtains property by extortion when he compels or induces another person to deliver such property to himself or to a third person by means of instilling in him a fear that, if the property is not so delivered, the actor or

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EDITOR'S NOTE

Pages 373-375 were missing at time of filming. If, and when obtained, a corrected fiche will be forwarded to you.

1
2 If you wish to have any of the testimony re-
3 peated, send in a note, Mr. Foreman, and we will
4 try to get it. But, try not to ask for everything
5 because we don't want to sit here all day and re-
6 peat it. Try to be specific if you really need it.
7 If you want any of the transcripts to be read in
8 Court, we will allow you to have that or to listen
9 to the testimony that we have through the trans-
10 cripts, that is Racker and Brecht discussing things
11 in that restaurant.

12 Let us know about that and we'll try to get
13 it for you.

14 If you need any help on the law, send in a
15 note and I'll try to help you.

16 Each of you is entitled to your own opinion.
17 But, you should exchange views with your fellow
18 jurors and listen carefully to each other.

19 While you should hesitate to change your
20 opinion if you are convinced that another one is
21 correct, your decision must be your own.

22 Any verdict must be unanimous with respect
23 to each of the counts. Your oath sums up your
24 duty and that is without fear or favor to any
25 person you will well and truly try the issues be-

1
2 fore you according to the evidence and according
3 to the laws that I have just explained to you.

4 Are there any objections to excusing these
5 two alternates?

6 MR. ACEN: No, Your Honor.

7 THE COURT: The two alternates are excused.
8 Take off your things and report downstairs. Do
9 not discuss this case with each other or anyone
10 else until after the verdict is in. Is that clear.

11 Thank you very much ladies.

CERTIFICATE OF SERVICE

March 11, 1916

I certify that a copy of this brief and appendix
has been mailed to the United States Attorney for the
Eastern District of New York.

Charles H. Henshaw